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No. (1)

Supreme Court, U.S.
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07-702

In The

Supreme Court of the United States

JOHN S. WILDER,

Petitioner,

v.

KEVIN P. TURNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer can, without probable cause to arrest and consistent with the Fourth and Fourteenth Amendment protections, ask a motorist suspected of driving while intoxicated, to perform a series of voluntary, but personally embarrassing "roadside sobriety maneuvers" on the side of the road in full public view, where the officer can then infer guilt and find probable cause to arrest from the fact that the motorist declines to perform these voluntary maneuvers?

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INTRODUCTION

This petition raises the question whether a police officer can infer guilt of driving under the influence of alcohol, and determine probable cause to arrest for that offense, from the fact that a motorist declines to perform "voluntary" roadside sobriety maneuvers.[1] At the time Judge Wilder was arrested in 2001 by Trooper Turner, the law in Colorado had been clear since a 1984 Colorado Supreme Court decision (*People v. Carlson*, 677 P.2d 310 (Colo. 1984)), that roadside sobriety maneuvers are personally invasive and embarrassing in public and do constitute a search under the federal and Colorado constitutions, and that a motorist cannot be required to perform these maneuvers absent probable cause to arrest. No inference could be drawn from the refusal to perform voluntary roadside sobriety maneuvers.

But the Tenth Circuit has decided in this case on matters not briefed by either party that roadside sobriety maneuvers do not constitute a search, and that an officer can infer guilt and obtain probable cause to arrest if a motorist declines to perform the voluntary maneuvers. The panel decision below reversed the jury verdict for Wilder and determined

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[1] Roadside sobriety maneuvers typically involve the heel-to-toe walk-and-turn maneuver, reciting the alphabet, counting forward and backward, touching one's ear and nose with your index finger while standing with feet together; and submitting to a Horizontal Gaze Nystagmus evaluation (pen or flashlight moved across one's field of vision).

that Trooper Turner had probable cause to arrest Judge Wilder[2] and Turner was, therefore, entitled to qualified immunity. That decision allows an officer to draw an inference of guilt from a motorist's exercise of what was then clearly established as a federal and state constitutional right – the right to decline to perform voluntary roadside sobriety maneuvers. Trooper Turner testified at trial that he had been trained that roadside sobriety maneuvers do constitute a search and that he could not draw an inference of guilt when a motorist refused to perform them.

There is a split of authority among state courts and federal courts over whether roadside sobriety maneuvers constitute a search for Fourth Amendment purposes. There is the further question whether an officer can derive probable cause to arrest for a state law offense from the fact that a motorist exercised his state constitutional right not to submit to what amounts to a search under state constitutional law. The panel decision creates the anomalous situation that anytime a Colorado motorist suspected of drunk driving refuses to perform roadside sobriety maneuvers, the officer can use that fact to find probable cause to arrest under federal law, and he can arrest that motorist with impunity, even though the state court will then suppress the evidence because the arrest was illegal and the officer lacked probable

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[2] Judge Wilder is the municipal judge in Monte Vista, Colorado, a position he has held for 30 years. He is also a former federal magistrate, having served in that capacity for 17 years.

cause under the state constitution. The Tenth Circuit decision gives a federal license to Colorado police officers to make unconstitutional and illegal arrests.

This case also presents the opportunity to resolve the conflict existing between the decision below and decisions of this court which generally hold that no inference of guilt can be drawn and no punishment can be inflicted for the exercise of a constitutional right.

On November 30, 2001, the law in Colorado was clearly established by the Colorado Supreme Court decisions of *People v. Roybal*, 655 P.2d 410 (Colo. 1982), *People v. Carlson,* 677 P.2d 310 (Colo. 1984), and *McGuire v. People,* 749 P.2d 960 (Colo. 1988), that the mere presence of an odor of alcohol on a driver's breath did not establish probable cause to arrest in Colorado, that Standard Field Sobriety Tests constitute a "search" requiring probable cause or consent, and that no inference could be drawn from a driver's refusal to perform Standard Field Sobriety Tests unless probable cause independently existed to support the search. Those were not issues upon which a reasonable police officer in Colorado could entertain any doubt prior to the panel decision in this case.

When Judge John Wilder told Trooper Turner, in reliance upon that well established law, law which Turner, himself, admitted he was trained to follow, that he did not wish to perform "voluntary roadside sobriety maneuvers" that night, on the side of an icy road, which maneuvers might have aggravated his

post-surgical back condition, he did so with the assurance of the Colorado Supreme Court that no adverse inference could be drawn from his decision. Now, as a result of the Tenth Circuit's decision, Wilder's reliance on previously established law and his attempt to vindicate his rights through a federal civil rights lawsuit has resulted in a cruel twist of fate: after five years of court battles, including two jury trials, judgment has now been entered against Wilder and costs of $8692 have been awarded against him. Judge Wilder's efforts to exercise his constitutional rights have twice backfired: first, he had to endure the distress and humiliation of an illegal arrest, and now, he has to pay Turner's costs.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Judicial Circuit is attached in the Appendix and it is reported at 490 F.3d 810 (10th Cir. 2007).

JURISDICTION

This case was brought in the federal district court as a civil rights action pursuant to 42 U.S.C. § 1983. As such, the district court had jurisdiction of the federal issues pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). The federal district court's judgment was entered in the second trial in this

matter on November 1, 2005, and an Amended Judgment was entered on February 24, 2006. Respondent-Appellant filed a timely Notice of Appeal on March 8, 2006, pursuant to F.R.A.P. 4(b). The United States Court of Appeals for the Tenth Judicial Circuit reversed the judgment of the federal district court in its order and opinion dated June 12, 2007, and ordered that judgment be entered in favor of the Respondent. The Petitioner's petition for rehearing or for rehearing *en banc* was denied on August 24, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. IV provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. XIV provides, in pertinent part:

> . . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

Petitioner John S. Wilder has been a municipal judge in Monte Vista, Colorado for more than 30 years. On the evening of November 30, 2001, Judge Wilder was stopped for speeding by State Trooper Kevin Turner while driving home after work. Turner noticed an odor of alcoholic beverage and asked Wilder if he had had anything to drink, and Wilder responded that he had a glass of wine before driving home. Turner told Wilder that he wanted to investigate further because Turner had indications that Wilder had consumed alcohol. Turner then asked Wilder if he would be willing to perform voluntary roadside sobriety maneuvers, and Wilder responded "what have I done to deserve this," and he declined to perform the maneuvers. Wilder advised Trooper Turner that he had recently had back surgery and he was concerned about that. Trooper Turner laughed. When Wilder then declined to perform the maneuvers, Trooper Turner told Wilder he was arresting him for driving under the influence of alcohol, and he advised Wilder to be careful not to slip on the ice on the side of the road. Judge Wilder was also charged with possession of a weapon while intoxicated, for a gun he was carrying in his car at the time. This roadside encounter was audio recorded by Trooper Turner, who was carrying a cassette recorder in his pocket at the time. The recording was played for the jury.

When Trooper Turner arrested John Wilder, Turner had no evidence of any erratic driving, or of

slurred speech, or of poor balance, or of staggered walk, or of failure to perform satisfactorily on voluntary roadside tests – *or of any other indicia of intoxication*. Turner wrote in his report that Wilder had watery and pinkish eyes, a flushed face, an odor of an alcoholic beverage, and he spoke "slowly." Turner testified at trial that Wilder's testimony in trial was the same slow speech he had heard during the traffic stop, and that indicated intoxication. The jury heard Judge Wilder's testimony at trial and his voice on the recording, and obviously concluded that Wilder did not sound drunk, and apparently did not accept the testimony of Turner as credible. The trial judge found:

> "Importantly, a tape recording was presented at trial of the encounter between Turner and Wilder which *allowed the jury to assess the credibility of many of the alleged indicators of alcohol intoxication*. For example, the taped encounter enabled the jury to assess the scope of Wilder's admissions to Turner, whether Wilder's speech was slow and deliberate, whether Wilder was argumentative, whether Wilder sounded intoxicated, and the general tone of the overall encounter between Turner and Wilder. ***The jury may well have decided based upon such tape that they did not find Turner's account of the encounter to be credible.***" App. 31-32.

Wilder was presented with a choice of either a breath or a blood test, pursuant to Colorado law, to

determine how much alcohol he had in his system; he elected to have a blood test, and he was taken in handcuffs to the local hospital where his blood was drawn, then later transported to jail, where he was booked and released. A few weeks later the test results came back: Judge Wilder's blood alcohol level was well below the level at which he might even be considered to be impaired, so low that the district attorney dismissed the case. Turner never realized he had arrested a judge for John Wilder didn't tell him.

Judge Wilder then brought this civil rights action against Trooper Turner, asserting that he had been arrested and charged without probable cause. Turner moved to dismiss the action, arguing he was entitled to qualified immunity, testifying in his supporting affidavit that he had arrested Wilder with probable cause because he had indicators that Wilder had consumed alcohol and because Wilder had refused to perform the voluntary roadside sobriety maneuvers.[3] The district court denied Turner's motion to dismiss, finding the officer had not established qualified immunity. The district court considered appropriate case law, understood that evidence of alcohol *consumption* was not evidence of *intoxication* and

[3] Turner testified to the opposite position at his second trial, where he testified that his earlier affidavit was wrong, that he had signed it because his attorneys asked him to, that he had been trained in Colorado law (*Carlson*) that roadside maneuvers did constitute a search, that without probable cause the tests were voluntary and he could draw no inference of guilt, and that he had followed his training.

disagreed that the "facts" established probable cause to arrest *under applicable Colorado law*. Judge Kane denied the motion – either as a Rule 12(b)(6) motion or as a motion for summary judgment, finding that Wilder had made out a case either way showing deprivation of his federal constitutional rights – the arrest was without probable cause and *a reasonable police officer in Turner's position would not have felt he had probable cause under Colorado law to arrest Wilder for DUI*. App. 23-24. Judge Kane found that a reasonable police officer in Turner's position would have known he could not rely on Wilder's refusal to perform voluntary roadside maneuvers to furnish probable cause to arrest. App. 22. Judge Kane also found the federal constitutional right (not to be arrested without probable cause) was clearly established at the time. Turner did not appeal this ruling at the time.

The case went to trial and Turner prevailed with the jury finding for him at that first trial. However, the district court threw out that result because of the significant misconduct of Turner's trial counsel, which misconduct had deprived Wilder of a fair trial.

When the case went back to trial for the second time, Turner did not file a timely motion to dismiss (he did file a motion, but the district court denied that motion as being untimely, and for being a delaying tactic by Turner).

The matter was presented to the jury and this jury found in favor of John Wilder. Turner argued at

this second trial that Wilder had not met his burden, but that the issue of qualified immunity was for the jury to decide. The jury found for Wilder, that he was arrested without probable cause, and they also found that Turner was not entitled to qualified immunity. The jury awarded Wilder substantial compensatory and punitive damages. Turner filed post-trial motions, and the trial judge then reduced the award and entered a final judgment.

Turner appealed this final judgment to the Tenth Circuit. After the matter was briefed, and set for oral argument on request of the parties, the panel hearing the case decided that oral argument would not be helpful. The panel then issued its decision, finding that Turner did have probable cause when he arrested Wilder, and that he had probable cause because Wilder had refused to perform the voluntary roadside sobriety maneuvers.

Turner did not argue at either trial or on appeal that he could infer guilt and determine probable cause because Wilder refused to perform the roadside sobriety maneuvers. Neither of the parties had even briefed these issues because both parties had accepted the fact that, under clearly established Colorado law, *roadside sobriety maneuvers constituted a search* under state and federal constitutional law, and an officer could not require a person to perform the maneuvers without first having probable cause to arrest the person, and an officer could draw no adverse inference from a motorist's decision not to perform these voluntary maneuvers. The Tenth

Circuit relied on allegedly "undisputed" facts which the first trial judge had not seen in the motion to dismiss and which the second trial judge indicated the jury might well not have believed.

REASONS FOR ALLOWING THE WRIT

I. There are conflicts between federal and state courts as to whether roadside sobriety maneuvers constitute a search or whether they are reasonable requirements in the Fourth Amendment context if an officer has reasonable suspicion to detain and challenge the driver as possibly being intoxicated.

This court needs to clarify whether roadside sobriety maneuvers are so intrusive that they do constitute a search, for which either consent or probable cause to arrest is required, or whether an officer can require a motorist perform such embarrassing maneuvers on the side of a road, in full public view, without consent and on less than probable cause, in order to prove his innocence. The public interest in enforcement of drunk driving laws is substantial, but that cannot outweigh the importance of the Fourth Amendment protections against unreasonable search and seizure.

State courts differ on whether an officer may detain a motorist for roadside sobriety tests so long as there is reasonable suspicion that the driver may be

intoxicated. *See, e.g., Galimba v. Municipality of Anchorage*, 19 P.3d 609, 612 (Alaska App. 2001) (the court assumed, but did not decide, that roadside maneuvers are a form of "*Terry* search" and only require reasonable suspicion, not probable cause to arrest); *State v. Lamme*, 19 Conn. App. 594, 563 A.2d 1372 (Conn. App. 1989), *affirmed*, 216 Conn. 172, 579 A.2d 484 (Conn. 1990) (administration of field sobriety tests requires only *Terry* reasonable suspicion); *State v. Little*, 468 A.2d 615, 617-18 (Me. 1983) (same); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175-76 (Ariz. 1986) (*en banc*) (roadside sobriety tests are a limited search for which reasonable suspicion suffices; probable cause is not required)); *State v. Wyatt*, 67 Haw. 293, 687 P.2d 544, 552-53 (Haw. 1984) (same); *State v. Pick*, 124 Idaho 601, 605, 861 P.2d 1266, 1270 (Id. App. 1993) (same); *but see People v. Carlson*, 677 P.2d 310 (Colo. 1984) (field sobriety test may be conducted only where officer has consent or preexisting probable cause to arrest for driving under influence); *State v. Nagel*, 880 P.2d 451, 455-456 (Ore. 1994) (roadside sobriety tests constitute a search, requiring probable cause or consent).

Many of these state cases above fail to articulate whether the maneuvers which were performed were *required* of the motorist or whether the motorist *consented* to perform them, but most seem to suggest the tests were required and that probable cause to arrest did not exist before the tests were performed. In these cases, officers did not infer guilt from a

driver's refusal to perform the tests. In the present case, Trooper Turner testified at trial that the roadside sobriety maneuvers he wished to administer were not required of Wilder, they were voluntary.

Federal courts which have addressed (or discussed) the issue have generally held that roadside sobriety tests only require reasonable suspicion, not probable cause: *see, e.g.*, *Rogala v. District of Columbia*, 161 F.3d 44 (1998) (cited by the Tenth Circuit) (district court's decision – in which that court held that administration of the sobriety test only required reasonable suspicion – was restated and summarily affirmed *per curiam*, but the appellate court did not reach the issue of the administration of the sobriety test to the driver, because the driver did not appeal); *United States v. Maher*, 454 F.3d 13, 18 (1st Cir. 2006) (court assumed, but did not decide, that reasonable suspicion was required for ordering a motorist to perform roadside sobriety tests); *Miller v. Harget*, 458 F.3d 1251 (11th Cir. 2006) (case relied upon by Tenth Circuit in this case for support that roadside sobriety maneuvers are minimally intrusive, but this summary judgment case, which says that only reasonable suspicion is required to conduct field sobriety tests, and which found the test ordered was minimally intrusive, was only discussing the administration of a portable breath test, not the requirement of roadside sobriety maneuvers; this case also relied on a Georgia state case which held that refusal to take a state-required alcohol test could be considered as evidence against the driver who has already been arrested,

pursuant to an express consent statute, even though in *Miller* the express consent statute was not invoked and the test was offered before the arrest); *Summers v. Utah,* 927 F.2d 1165 (10th Cir. 1991) (42 U.S.C. § 1983 case – cited as controlling authority by the Tenth Circuit in this case – where the court stated in *dicta*, summarily affirming summary judgment against a *pro se* plaintiff, that probable cause to arrest for driving while intoxicated existed because of evidence of [unspecified bad] driving, odor of alcohol, and refusal to perform roadside sobriety maneuvers, but the plaintiff had not raised a Fourth Amendment claim of unreasonable search and seizure in that case; the case presented a due process claim about automobile impoundment fees!).

This court, in reviewing the reasonableness of roadside checkpoints for illegal aliens, has indicated that anything more than a minimal detention of travelers with brief questioning and observation must be justified on the basis of *consent or probable cause*. *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976). This court has stated in *dicta*, referring to the statement above from *Martinez-Fuerte*, that after the initial stop and questioning of drivers at a roadside sobriety checkpoint, more individualized suspicion (rather than consent or probable cause) may be required to justify further detention of a motorist and more extensive roadside sobriety testing. *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 449 (1990). No decision of this court has held that a police officer may, without violating the Fourth Amendment,

require a motorist merely suspected of drunk driving, to submit to the embarrassing and humiliating roadside sobriety maneuvers, in full public view, to prove his innocence, or that an officer can infer guilt and obtain probable cause to arrest a motorist because the motorist declines to perform voluntary roadside sobriety maneuvers. Wilder declined to perform the maneuvers; he explained he had recently had back surgery; he was asked to perform the maneuvers on the side of an icy road. No inference of guilt was logically or legally justified.

This court has held that states may impose reasonable obligations on citizens involved in a *Terry* stop, but noted that the Fourth Amendment ***does not impose obligations on citizens***, it recognizes established rights. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 188 (2004). A state law may impose reasonable obligations, such as requiring a person to identify themselves in a *Terry* stop – because such an obligation is limited, but Colorado has no law requiring drivers to perform roadside sobriety maneuvers and such an obligation would be far more intrusive than the compelled self-identification allowed in *Hiibel*.

II. The Tenth Circuit's decision conflicts with many decisions of this court which generally hold that no inference of guilt can be drawn, and no punishment can be inflicted, because of the exercise of a constitutional right.

The Fifth Amendment right against self-incrimination protects the defendant in a criminal trial from any adverse inferences being drawn from the exercise of this right. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). Due process protections of the Fourteenth Amendment prohibit using for impeachment purposes at trial the defendant's pre-trial exercise of the right to remain silent after receiving *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610 (1976). A person unlawfully seized may not be punished for exercising his right to refuse to identify himself. *Brown v. Texas*, 443 U.S. 47, 53 (1979). A person who exercises his right to refuse to listen to police or to answer their questions does not thereby furnish the police with grounds for his arrest. *Florida v. Royer*, 460 U.S. 491, 498 (1983). A criminal conviction may not stand if, even in part, it is based on acts which constitute the exercise of constitutional rights. *Street v. New York*, 394 U.S. 576, 586-587 (1969).

John Wilder was exercising his clearly established constitutional right – under the Colorado constitution even assuming that the Tenth Circuit was right that the Fourth Amendment did not protect his right – to refuse to perform voluntary [or even involuntary] roadside sobriety maneuvers. Wilder

knew the tests were voluntary and Turner testified that they were voluntary. The Tenth Circuit, however, has now held that exercise of this constitutional right[4] gave rise to probable cause to arrest.

CONCLUSION

John Wilder was arrested because he exercised what he and Trooper Turner understood were Wilder's clearly established federal and state constitutional rights to refuse to perform roadside sobriety maneuvers. The Tenth Circuit decision implies that the performance of roadside sobriety maneuvers was required and holds that Wilder's refusal was the basis for probable cause to arrest him. It is important that this court clarify that no inference of guilt of a state criminal offense can be drawn from the exercise of a constitutional right – whether that is a state or a federal constitutional right. It is also important that this court resolve the important issue whether the requirement for performing roadside sobriety maneuvers is a full-blown search for Fourth Amendment purposes, or whether it is a limited search for which reasonable suspicion is sufficient.

[4] The Colorado Supreme Court had held that this was both a federal and a state constitution-protected right. *See People v. Carlson*, 677 P.2d 310, 317 (Colo. 1984).

John Wilder brought this civil rights action because he knew that his rights had been violated and something had to be done:

Q. Why did you bring this lawsuit, then?

A. That asks me to essentially condense my life. I can do it. The shortest version of that would be two things that have been said to me. My moral guide from very early in life was my father, who every time I would confront him with a moral question would respond by saying, you must always do what is right. When I went to law school and asked him ethical questions, his consistent response was, you must always do what is right.

After what happened to me in this incident, I talked to a civil rights attorney in Denver, because I was – I was absolutely dumbfounded by what had happened. And I asked him the same question, and essentially said, why in God's name would I go into a courtroom as a plaintiff after I have spent my entire career keeping my clients out of courtrooms and refusing to go to courtrooms. And he said – this is a quote – if you don't, who can?

I returned to the Valley. I went through two sessions of my little court in Monte Vista and looked at the pretty much powerless people that I was dealing with, and after two weeks pretty much came to the conclusion that

> none of them would have a chance. So if I didn't, who can?

If the Tenth Circuit's decision stands, the answer to Wilder is: No one can. The jury heard all of the facts in this case and their verdict should be reinstated.

Dated this 23d day of November, 2007.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN S. WILDER,

Plaintiff-Appellee,

v.

KEVIN P. TURNER,

Defendant-Appellant.

No. 06-1092

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (02-CV-732-WYD-CBS)

(Filed June 12, 2007)

John W. Suthers, Attorney General; Daniel D. Domenico, Solicitor General; Frederick Haines, First Assistant Attorney General; Patricia D. Herron, Assistant Attorney General; Kathleen Spalding, Assistant Attorney General; Denver, Colorado, for Defendant-Appellant.

Paul Grant, Centennial, Colorado, for Plaintiff-Appellee.

Before **KELLY**, **BALDOCK**, and **GORSUCH**, Circuit Judges.*

BALDOCK, Circuit Judge.

This civil rights action arises out of a traffic stop and arrest of Plaintiff for allegedly driving under the influence of alcohol (DUI). We are asked to decide whether an officer has probable cause to arrest a driver that refuses to submit to a roadside sobriety test after the officer observes certain indicia of alcohol consumption. The district court said no and denied the officer qualified immunity. A jury subsequently returned a verdict against the officer. We have jurisdiction pursuant to 28 U.S.C. § 1291. We hold the officer had probable cause to arrest the driver on suspicion of DUI, and is, therefore, entitled to qualified immunity.

I.

The relevant historical facts are undisputed. On the evening of November 30, 2001, Defendant Kevin Turner, a Colorado highway patrolman, stopped Plaintiff John Wilder's vehicle for traveling 57 mph in

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

a 50 mph zone. Officer Turner approached the vehicle, asked Wilder for his documentation, and explained the reason for the stop. In the course of the initial encounter, Officer Turner noticed an odor of alcohol on Wilder's breath and observed Wilder had pinkish and watery eyes, a flushed face, and spoke unusually slow and deliberately. Officer Turner asked Wilder how much alcohol he had to drink. Wilder candidly admitted he had a glass of wine ten to fifteen minutes earlier. The officer asked Wilder if he had anything else to drink. Wilder responded he did not. Initially, Wilder's demeanor was argumentative, but eventually became cooperative.[1]

Officer Turner asked Wilder to exit the vehicle and walk to the rear. The officer noticed Wilder's exit was normal, and that Wilder did not have difficulty walking. The officer also noticed Plaintiff's clothing was orderly. The officer asked Wilder if he would perform a roadside sobriety test. Wilder declined and asked the officer: "What have I done to deserve this." The officer explained he observed certain indicia of alcohol consumption and needed to investigate further. Officer Turner asked Wilder a second time if he was willing to perform a roadside sobriety test. Wilder replied: "I really don't want to." The officer

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[1] While not denying he was speeding, Wilder attempted to justified his conduct by claiming he was forced to pass a vehicle that, in his opinion, was traveling unreasonably slow, but suddenly sped up when Plaintiff was in the process of passing it.

then arrested Wilder on suspicion of DUI.[2] At that point, Wilder told the officer he had a weapon in his vehicle for which he had a permit. While searching the vehicle, the officer found a half-empty, single-serving bottle of wine on the front passenger seat, which Wilder covered with newspapers before the stop.

After Officer Turner advised Wilder of his rights, Wilder asked to be given a blood alcohol test.[3] Officer Turner drove Wilder to a nearby medical center where he received a blood test. The officer charged Wilder with DUI in violation of Colo. Rev. Stat. § 42-4-1301(1)(a), as well as unlawful possession of a weapon while intoxicated in violation of Colo. Rev. Stat. § 18-12-106(1)(d). The officer released Wilder after Wilder posted a personal recognizance bond. The blood test, which the officer received a few days later, revealed Wilder's alcohol-blood content was

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[2] After the arrest, Plaintiff apparently changed his mind and agreed to take a roadside sobriety test, but the officer informed Plaintiff he was under arrest.

[3] Colo. Rev. Stat. § 42-4-1301.1(2)(a)(1), provides:

> Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of such person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI[.]

.014%, well below the level at which intoxication is presumed under Colorado law. As a result, the Rio Grande County Court dismissed all charges against Plaintiff.

Wilder thereafter brought this 42 U.S.C. § 1983 action against Officer Turner alleging the officer violated his Fourth Amendment right to be free from unreasonable searches and seizures when the officer (1) arrested him without probable cause, (2) seized his gun without probable cause, and (3) presented charges to the district attorney without probable cause. Officer Turner moved for summary judgment asserting a defense of qualified immunity. The officer argued he had probable cause to arrest Plaintiff because he observed several indicia of excessive alcohol consumption, and because Plaintiff refused to submit to the roadside sobriety test. The district court denied the officer's motion.

The court relied extensively on the Colorado Supreme Court's decision in *People v. Carlson,* 677 P.2d 310 (Colo. 1984), to conclude "a reasonable peace officer in [Officer] Turner's position would not believe he had probable cause *under Colorado law* to arrest Plaintiff for DUI." (emphasis added). *Carlson* held a roadside sobriety test constitutes a full search and, therefore, before an officer can lawfully ask an individual to submit to a roadside sobriety test, the officer must have probable cause to believe the driver is under the influence of alcohol. *See Carlson,* 677 P.2d at 317-318. The district court explained the indicators of alcohol consumption Officer Turner observed did

not, as a matter of Colorado law, create probable cause to arrest. Under *Carlson,* the court explained, the indicators Officer Turner observed were not enough to establish probable cause, but rather only reasonable suspicion. The court further explained that refusing to take a field sobriety test cannot create probable cause to arrest because under *Carlson,* an officer may lawfully ask an individual to perform a field sobriety test only if the officer has probable cause to believe the suspect is intoxicated.

Following a two-day trial, a jury returned a verdict in Officer Turner's favor. Wilder timely moved for a new trial pursuant to Fed. R. Civ. P. 59(a) arguing Officer Turner's counsel engaged in persistent misconduct that affected and prejudiced the jury. The court agreed and granted a new trial. The court cursorily explained that "numerous deviations of defense counsel from acceptable norms are so flagrant that I am left with the abiding sense that the Plaintiff did not receive a fair trial." Prior to the second trial, Officer Turner renewed his motion for summary judgment again asserting a defense of qualified immunity. The court, however, denied the motion as untimely. The case proceeded to trial.

At the close of Plaintiff's case and again at the close of all the evidence, Officer Turner moved for a judgment as a matter of law under Fed. R. Civ. P. 50. The officer again argued that during the stop he observed several indicators of excessive alcohol consumption, and that his observations coupled with Plaintiff's refusal to take a field sobriety test amply

supported a finding of probable cause to arrest Wilder for DUI. The court denied the motion. The court explained the evidence on the record, such as Wilder's ability to exit the vehicle and walk normally, his cooperative attitude, and his orderly clothes, could support a finding the officer lacked probable cause to arrest Wilder for DUI.

This time, the jury returned a verdict for Wilder and awarded him $1 million dollars in damages. Officer Turner again moved for a judgment as a matter of law or in the alternative for relief from judgment or for a new trial pursuant to Fed. R. Civ. P. 50(b) and 59. Once more the officer asserted a defense of qualified immunity arguing he had probable cause to arrest Wilder based on his observations and Plaintiff's refusal to cooperate with the investigation. The court denied the officer's post-trial motions reasoning the jury could reasonably infer a lack of probable cause from the evidence and that the officer arrested Plaintiff for an unlawful reason, *i.e.,* refusing to take a roadside sobriety test. This appeal followed.

II.

Whether Officer Turner is entitled to qualified immunity is a legal question we review de novo. *See Cortez v. McCauley,* 478 F.3d 1108, 1115 (10th Cir. 2007) (en banc). When an officer asserts a defense of qualified immunity, the plaintiff bears a heavy two-part burden. *See id.* at 1114. Initially, the plaintiff must show the officer's conduct violated a

constitutional right: "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201 (2001). If the officer's conduct did not violate a constitutional right, the inquiry ends and the officer is entitled to qualified immunity. *See id.*

Throughout the course of this litigation, Plaintiff's position has been that Officer Turner's actions violated his Fourth Amendment right to be free from unreasonable seizures because the officer's observations and Plaintiff's refusal to take a field sobriety test were insufficient to establish probable cause to arrest him on suspicion of DUI. Agreeing with Plaintiff, the district court denied Officer Turner's qualified immunity defense at each stage of the litigation. Deriving the legal framework for its probable cause determination exclusively from Colorado case law, the court concluded: (1) the officer's observations were insufficient to establish probable cause to arrest for allegedly driving while under the influence, and (2) because probable cause must exist before an officer may lawfully ask an individual to participate in a field sobriety test, refusing to take the test cannot itself establish probable cause to arrest.

A.

When a warrantless arrest is the subject of a § 1983 action, the defendant is entitled to qualified immunity if probable cause existed to arrest the plaintiff. *See e.g., Atwater v. Lago Vista,* 532 U.S. 318, 322 (2001) ("[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Probable cause to arrest exists if, the facts and circumstances within the officer's knowledge are sufficient to justify a prudent officer in believing the defendant committed or is committing an offense. *See United States v. Stephenson,* 452 F.3d 1173, 1178 (10th Cir. 2006). Probable cause only requires a probability of criminal activity, not a prima facie showing of such activity. *See Illinois v. Gates,* 462 U.S. 213, 243 n. 13 (1983); *see also United States v. Jurado-Vallejo,* 380 F.3d 1235, 1239 (10th Cir. 2004) (Because the law only demands a "fair probability," we do not require "greater proof – certainly not conclusive proof of any particular factor establishing probable cause."). We determine probable cause from the totality of the circumstances taking into account both inculpatory as well as exculpatory evidence. *See Stephenson,* 452 F.3d at 1178.

Of course a "violation of state law cannot give rise to a claim under Section 1983." *Marshall v. Columbia Lea Regional Hosp.,* 345 F.3d 1157, 1164 (10th Cir. 2003). "Section 1983 does not . . . provide a basis for redressing violations of *state law,* but only

for those violations of *federal law* done under color of state law." *Jones v. City and County of Denver,* 854 F.2d 1206, 1209 (10th Cir. 1988). "While it is true that state law with respect to arrest is looked to for guidance as to the validity of the arrest since the officers are subject to those local standards, it does not follow that state law governs." *Wells v. Ward,* 470 F.2d 1185, 1187 (10th Cir. 1972). Nor, perhaps more importantly, are we bound by a state court's interpretation of federal law – in this case the Fourth Amendment. "It is beyond cavil that we are not bound by a state court interpretation of federal law" regardless of our jurisdictional basis. *Grantham v. Avondale Indus., Inc.,* 964 F.2d 471, 473 (5th Cir. 1992) (citing cases); *accord RAR, Inc. v. Turner Diesel, Ltd.,* 107 F.3d 1272, 1276 n.1 (7th Cir. 1997). The right Plaintiff claims Officer Turner violated in this case arises under federal law. And the officer's claim to qualified immunity is a federal defense. Understandably, then, the standard governing the officer's defense must be federal law. *See id.* Applying the correct standard to review Officer Turner's qualified immunity defense, we conclude the Tenth Circuit precedent of *Summers v. Utah,* 927 F.2d 1165 (10th Cir. 1991) controls.

B.

In *Summers,* the driver of a vehicle challenged the illegality of his arrest under § 1983 after his DUI charge was dismissed. We summarily rejected the driver's challenge holding probable cause for an arrest arose when the officer detected the scent of

alcohol on the driver who subsequently refused to perform a field sobriety test:

> With respect to the legality of plaintiff's arrest, the magistrate concluded that the surrounding circumstances provided [the officer] with the requisite probable cause. *The undisputed facts regarding plaintiff's operation of his vehicle, the officer's scent of alcohol emanating from the vehicle and plaintiff's refusal to take a field sobriety test substantiate the magistrate's conclusion.* We agree that plaintiff, who only notes in this regard that his DUI charge was later dismissed, has failed to demonstrate that his arrest by [the officer] was improper. Since probable cause for a warrantless arrest is determined in terms of the circumstances confronting the arresting officer at the time of the seizure, the validity of such an arrest is not undermined by subsequent events in the suspect's criminal prosecution such as dismissal of charges.

Id. at 1166 (emphasis added) (internal citations omitted).

Recently, in *Miller v. Harget,* 458 F.3d 1251 (11th Cir. 2006), the Eleventh Circuit relied on *Summers* to reach a like conclusion. In *Miller,* the court held that an officer had probable cause to arrest an individual on suspicion of DUI where (1) the officer witnessed the individual driving a vehicle, (2) the officer smelled alcohol emanating from the vehicle's interior, and (3) the individual refused to take a

breathalyzer test. Citing *Summers* with approval, the Court explained:

> Whether or not [the officer] had probable cause to arrest Mr. Miller because the officer smelled alcohol coming from the vehicle, the officer did have reasonable suspicion. He reasonably detained Mr. Miller in order to investigate whether he had been driving under the influence. *From this detention, probable cause developed, justifying Mr. Miller's arrest, because Mr. Miller refused to take a breathalyzer test.*

Id. at 1259-60 (emphasis added) (internal citations omitted).

In this case, Officer Turner observed several indicia of Plaintiff's alcohol consumption including a moderate odor of alcohol, pinkish and watery eyes, a flushed face, unusually slow and deliberate speech, and slow hand movements. Under the totality of the circumstances, the officer's observations amply support a conclusion that the officer had an objectively reasonable and articulable suspicion of criminal activity to justify detaining Plaintiff for further investigation. *See id.* at 1259; *see also United States v. Neumann,* 183 F.3d 753, 756 (8th Cir. 1999) (holding detection of alcohol on a driver's breath during a routine traffic stop gave rise to reasonable suspicion). From this detention, probable cause developed when twice Plaintiff refused to participate in a field sobriety test. *See Summers,* 927 F.2d at 1166; *see also Miller,* 458 F.3d at 1259.

A prudent officer could reasonably conclude from Plaintiff's refusal to participate in a field sobriety test coupled with the observation of several indicators of excessive alcohol consumption that Plaintiff was under the influence of alcohol. *See Miller,* at 1260. A field sobriety test is a minor intrusion on a driver only requiring a reasonable suspicion of intoxication and "an easy opportunity to end a detention before it matures into an arrest." *Id.*; *see also Rogala v. District of Columbia,* 161 F.3d 44, 52 (D.C. Cir. 1998) (holding that only reasonable suspicion is required to conduct a field sobriety test because it is such a minimal intrusion on the driver). A reasonable officer in Officer Turner's position could view Plaintiff's refusal to submit to a field sobriety test as indicative of an intent to conceal evidence of guilt. As *Miller* correctly notes:

> Any other conclusion would tie the hands of law enforcement in their efforts to keep intoxicated drivers off the streets. If a driver refused to submit to a test after an officer smelled alcohol, the officer would have no choice but to let him or her go, absent other evidence the driver had been drinking.

Miller, 458 F.3d at 1260. A contrary conclusion would simply allow a driver to "escape arrest simply by refusing to cooperate." *Id.*

Because Plaintiff failed to carry his burden to show the officer violated his Fourth Amendment rights, the judgment of the district court is reversed. This cause is remanded with instructions to enter

judgment in favor of Officer Turner on the basis of qualified immunity.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **02-K-732**

JOHN S. WILDER,

Plaintiff,

v.

KEVIN P. TURNER,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Sept. 5, 2002)

KANE, J.

This is a civil rights action arising out of traffic stop and ultimate arrest of Plaintiff for driving while intoxicated ("DUI"). Plaintiff denies Defendant had probable cause to arrest him, and claims Defendant's actions in arresting him, searching his car, seizing his gun and bringing charges against him deprived him of his rights under the Fourth Amendment of the United States Constitution and entitle him to damages and related relief under 42 U.S.C. § 1983. Defendant maintains his conduct was reasonable under the circumstances and invokes the defense of qualified immunity.

The matter is before me on Defendant's Motion to Dismiss which Defendant, because he relied on his police report and related matters outside the pleadings during the course of briefing, has asked be

converted to a Motion for Summary Judgment. I grant the request but decline, at this stage of the proceedings, to conclude as a matter of law that Defendant is shielded from suit under the principle of qualified immunity. There are sufficient facts in the record to create an inference that Defendant unreasonably arrested Plaintiff without probable cause in violation of Plaintiff's Fourth Amendment rights. Additional allegations, moreover, viewed together with the fact that blood tests ultimately revealed Plaintiffs blood alcohol content was far below what would even qualify him as impaired under Colorado law, may support an inference that Defendant arrested Plaintiff in retaliation for his having refused to perform voluntary roadside maneuvers or was otherwise acting out of personal animus toward Plaintiff. While Defendant is still entitled to maintain a defense of qualified immunity, the defense will not, under these circumstances, shield him from suit as a matter of law at this stage of the proceedings.

I. FACTS.

In the early evening of November 30, 2001, Colorado State Patrol Corporal Kevin P. Turner stopped Plaintiff John S. Wilder for speeding in Rio Grande County. Turner noted Plaintiff pulled off the road in a safe manner, walked normally, and was cooperative in producing his paperwork. Turner also noted, however, that Plaintiff had a moderate odor of alcohol, watery and pinkish eyes, slow speech, and slow hand movements. Turner reportedly asked the

Plaintiff how much he had to drink, to which Wilder answered one glass of wine 10-15 minutes before being stopped. When Wilder refused to perform voluntary roadside maneuvers, officer Turner handcuffed him and placed him under arrest for DUI in violation of C.R.S. § 42-4-1301(1)(a). In his affidavit, Officer Turner states he arrested Wilder, *inter alia*, "because Mr. Wilder refused to perform voluntary roadside maneuvers." Affid. at ¶ 3.

Once informed that he was under arrest, Wilder offered to perform the roadside maneuvers, but Turner declined. Plaintiff's blood alcohol level ultimately was determined to be .014 (grams per milliliter of blood), well below the .05 necessary to constitute even driving while impaired and only a fraction of the .1 level necessary to constitute DUI. The Rio Grande County Court dismissed the charges against Plaintiff on January 10, 2002.

II. DISCUSSION.

A. Applicable Legal Standards.

Section 1983 imposes civil liability only upon

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .

42 U.S.C. § 1983. "Qualified immunity is an affirmative defense to a section 1983 action, providing immunity [sic] from suit from the outset" *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) (internal quotation omitted). Accordingly, if the defense of qualified imunity is asserted, it should be resolved "at the earliest possible stage in litigation." *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001).

In the instant case, Officer Turner maintains that he enjoys qualified immunity for his discretionary actions as a peace officer. He first raised the defense in a Motion to Dismiss under Fed. R. Civ. P. Rule 12(b)(6), but, when he relied on matters outside the pleadings to establish his defense, he asked that the Motion be converted to one for summary judgment. *See* Fed. R. Civ. P. 12(b)(providing for the conversion of Rule 12(b)(6) motions to motions for summary judgment under Rule 56 "if . . . matters outside the pleading are presented to and not excluded by the court"). Plaintiff objects and has briefed the issue under a Rule 12(b)(6) standard without reference to any matters outside the pleadings. Because I find Officer Turner has failed to establish his entitlement to the defense under either standard, I GRANT the request to convert the Motion to one for summary judgment and DENY the Motion for Summary Judgment under a Rule 56 standard.

Qualfied [sic] immunity shields government officials performing discretionary functions from individual liability under 42 U.S.C. § 1983 unless their conduct violates "clearly established statutory or constitutional

rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "To reach the question of whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right at all." *Romero v. Fay,* 45 F.3d 1472, 1475 (10th Cir. 1995) (internal quotation omitted) (applying *Siegert v. Gilley,* 500 U.S. 226, 231-33 (1991)). This requires the district court to "first determine whether plaintiff's allegations, if true, state a claim for a violation of a constitutional right that was clearly established when defendant acted." *Id.* (quotation, again, omitted).[1] If plaintiff successfully carries this two-part test, the burden shifts to the defendant as an ordinary movant for summary judgment of showing there are no disputes of material fact about whether his conduct was objectively reasonable in light of clearly established law and the information known to him at the time. *Mick,* 76 F.3d at 1134 (citing *Albright,* 51 F.3d at 1535). *See Romero,* 45 F.3d at 1475. Officer Turner maintains he is entitled to summary judgment based on qualified immunity because Plaintiff cannot meet

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[1] As the Tenth Circuit elaborated in *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir. 1995), this initial burden is analyzed in two steps: whether plaintiff has shown (1) "that the defendant's actions violated a constitutional or statutory right," and (2) that the right "allegedly violated [was] clearly established at the time of the conduct at issue." *Discussed in Mick v. Brewer,* 76 F.3d 1127, 1134 (10th Cir. 1996), *see also Saucier v. Katz,* 121 S. Ct. 2151, 2156 (2001).

the first step of his two-part initial burden, *viz*, the facts alleged cannot establish that, at the time Turner arrested Wilder, he lacked probable cause.

"When a warrantless arrest is the subject of a § 1983 action, the defendant arresting officer is 'entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest' the plaintiff." *Romero*, 45 F.3d at 1476 (quoting *Hunter v. Bryant,* 502 U.S. 224, 228 (1991)). Probable cause exists if facts and circumstances within the arresting officer's knowledge are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense. *Id.* "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Id.* (quoting *Hunter* at 227).

B. *Merits of Qualified Immunity Defense.*

Plaintiff asserts that under clearly established Colorado law, the facts and circumstances within Officer Turner's knowledge were insufficient to establish probable cause to arrest him for DUI. Pl's Resp. to Mot. Dismiss at 1-3. Specifically, Plaintiff cites *People v. Roybal,* 655 P.2d 410, 413 (Colo. 1982) for the proposition that, under Colorado law, the odor of alcohol is not inconsistent with the ability lawfully to operate a motor vehicle and does not, by itself, establish probable cause to arrest for DUI. In addition, Plaintiff relies on the rule articulated in *People v. Carlson*, 677 P.2d 310 (Colo. 1984) that probable

cause must exist *before* a Colorado law peace officer may lawfully ask an individual to submit to roadside maneuvers to argue his refusal to do so on the evening in question could not give *rise* to probable cause for his arrest as a matter of law.

Officer Turner distinguishes *Roybal* and *Carlson* and relies on the District of Kansas' decision in *Mason v. Stock*, 955 F. Supp. 1293 (D. Kan. 1997) to argue the indicia of intoxication he claims to have observed (the odor of alcohol, the flushed face, watery eyes, slow speech and slow hand movements), together with the refusal to submit to roadside maneuvers, were sufficient to establish probable cause for purposes of qualified immunity. I find Wilder has the better argument with respect to the existence of a Fourth Amendment violation in the first instance, and conclude Officer Turner has failed to carry his burden under *Albright* and *Mick* of showing no material issues of fact remain that could defeat his claim of qualified immunity.

The facts in the record to date, viewed in the light most favorable to Plaintiff, are sufficient to establish that Officer Turner lacked probable cause to arrest Wilder for DUI based on the information he had at the time. The facts alleged and offered at this stage of the proceedings, viewed in the light most favorable to Plaintiff, show Plaintiff was stopped for driving 57 mph in a 50 mph zone and pulled over normally. On his Impairment Examination Report completed at the scene, Officer Turner circled a list of words stating Plaintiff had a "moderate" odor of

alcohol on his breath, a "flushed face," "watery pinkish eyes," "slow speech" and "slow hand movements." He also noted a "normal" vehicle exit and "normal" walk. Plaintiff told Turner he'd had one glass of wine about 15 minutes earlier at which time Turner asked Plaintiff if he would perform voluntary roadside maneuvers. When Plaintiff declined, Officer Turner placed him in handcuffs and informed he was under arrest.

Carlson stands firmly for the proposition that under Colorado law, roadside sobriety testing constitutes a "full 'search'" in the constitutional sense of that term and can be administered only with consent or where there is *already* probable cause to arrest the driver for driving under the influence or while impaired. 677 P.2d at 317-18. In other words, probable cause must exist before the request. A refusal, therefore, cannot *create* probable cause under Colorado law and a reasonable officer in Turner's position would have known that Wilder's refusal to perform maneuvers in this case could not be used as grounds to arrest him unless the other indicia of intoxication he noted were sufficient, by themselves, to establish probable cause for doing so. On this issue, *Carlson* is again instructive.

In *Carlson,* the Colorado Supreme Court distinguished "limited intrusions" into personal security that may be constitutionally supported on a "lesser quantum of evidence than probable cause" from "the traditional arrest and full-scale search" category of intrusions into which roadside sobriety testing falls.

See Carlson, 677 P.2d at 315, 317. In *Carlson,* red eyes, an odor of alcohol "coupled with the somewhat erratic driving previously observed" was deemed to have furnished the police officer in that case with an "articulable and specific basis in fact" to warrant the "limited intrusion" of requiring the driver to step out of his car and walk to the rear of the vehicle during an otherwise valid investigatory stop. *Id.* at 315. Because the roadside testing issue in *Carlson* turned on the question of consent, the Court did not address the evidentiary basis necessary to give rise to probable cause for the constitutionally greater intrusion of requesting the performance of roadside sobriety testing. It stands to reason, however, that under *Carlson* something more than red eyes, an odor of alcohol and erratic driving – which I note was not observed in this case – would be required. *See Roybal,* 655 P.2d at 413 ("odor of alcohol" and collision insufficient to establish probable cause for arrest).

For purposes of Officer Turner's qualified immunity defense in this case, I conclude Plaintiff has met his burden of establishing a constitutional violation under the two-part test set forth in *Albright* and *Romero.* Even assuming Turner observed Plaintiff driving 57 mph in a 50 mph zone, having a flushed face, watery pinkish eyes, slow speech and slow hand movements and elicited an admission from Plaintiff that he'd had one glass of wine 15 minutes before being stopped (all of which Plaintiff neither admits nor denies in his Complaint), a reasonable peace officer in Turner's position would not believe he had

probable cause under Colorado law to arrest Plaintiff for DUI.

The Kansas district court's decision in *Mason* does not compel a different result. *Mason,* as an initial matter, is not binding on this court and involved a Kansas police officer acting under Kansas law. Kansas law, unlike Colorado law, apparently did not at the time of the arrest at issue include a state supreme court decision stating that probable cause to arrest must exist *before* a driver's refusal to submit to voluntary roadside sobriety testing could be used to justify an arrest. *See Mason*, 955 F. Supp. 1293, 1303 (plaintiff's erratic driving, difficulty communicating, admission of having something to drink, "and his refusal to take a field sobriety test gave [police officer] probable cause to arrest [plaintiff] for driving under the influence"). *C.f. Carlson*, 677 P.2d at 317-18. In *Mason,* moreover, it was undisputed that plaintiff was pulled over for driving "erratically," an arguably more probative indicia of intoxication than driving 57 in a 50 mph zone. The allegation that Turner was acting with actual malice toward Plaintiff, coupled with his admission that he arrested Plaintiff in part "because" he refused to perform maneuvers and the fact that blood tests ultimately revealed Plaintiff had a blood alcohol content far below that which would give rise to even an impairment charge, create an additional inference, at least, that Turner's arrest may, in fact, have been retaliatory or the result of personal animus against Wilder, both of which bely [sic] the assertion that Turner

believed he had probable cause to arrest Wilder. For purposes of summary judgment, Wilder has carried his initial burden of establishing Turner arrested him without probable cause.

Under these circumstances, the burden shifts to Turner to demonstrate there are no factual issues that would defeat his claim of qualified immunity. Here, this means no reasonable inference could be drawn from the facts viewed in the light most favorable to Wilder that Turner was acting unreasonably based on what he understood to be the facts at the time under the clearly established law. While this may ultimately prove to be true, I am unwilling at this stage of the proceedings to make that conclusion as a matter of law. While there clearly is an inference from the facts in the record to date that Officer Turner was acting reasonably, the facts also support an inference that he was not. Accordingly, Turner is not entitled to a dismissal, or summary judgment, on his defense of qualified immunity at this stage of the proceedings.

This does not mean that Turner may not, under appropriate circumstances, renew his motion at some later stage of the proceedings. It simply means he has not succeeded, at this time, in showing he is immune from suit entirely. *See Thompson v. Mahre,* 110 F.3d 716, 720 (9th Cir. 1997) ("denial of a defense motion on qualified immunity merely leaves the issue for trial, and does not destroy the defense"); *Alvardo v. Picur,* 859 F.2d 448, 451 n.3 (7th Cir. 1988) ("Although the benefit of qualified immunity as an immunity

from suit effectively lost once the parties go to trial," it may be raised "as a defense to liability at any stage in the litigation.").

Because Defendant relies on matters outside the pleadings to establish his defense of qualified immunity, his Motion to Dismiss is converted to a Motion for Summary Judgment under Rule 12(b) and is DENIED.

Dated this 5 day of September, 2002, at Denver, Colorado.

/s/ John L. Kane
JOHN L. KANE
U.S. SENIOR DISTRICT
COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
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Date: **September 5, 2002**

Case No. **02-K-732**

The undersigned hereby certifies that on the above date a true and correct copy of the preceding **ORDER** signed by Judge John L. Kane on **September 5, 2002** was mailed to the following:

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September 5, 2002

JAMES R. MANSPEAKER,
CLERK

/s/ Geneva D. Mattei
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 02-cv-00732-WYD-CBS

JOHN S. WILDER,

Plaintiff,

v.

KEVIN P. TURNER,

Defendant.

ORDER

(Filed Feb. 6, 2006)

THIS MATTER is before the Court on several post-trial motions. Specifically, on November 16, 2005, Defendant filed a Motion Pursuant to Fed. R. Civ. P. 50(b) for Judgment N.O.V. or, in the Alternative, for Relief from Judgment or a New Trial Pursuant to Fed. R. Civ. P. 59. A response to this motion was filed December 6, 2006, and a reply was filed January 17, 2006. Also filed were motions for attorneys fees by Plaintiff and Plaintiff's Motion for Court Order to Assess Costs of Court's Audio Expert. I address these motions below.

II. BACKGROUND

Defendant Kevin P. Turner ["Turner"] conducted a traffic stop of Plaintiff John S. Wilder ["Wilder"] on

November 30, 2001. Defendant Turner alleged that he observed indicators of alcohol use and arrested Wilder for suspicion of driving under the influence of alcohol and illegal possession of a firearm while intoxicated. Plaintiff Wilder sued Turner under 42 U.S.C. § 1983, claiming that he was arrested and charged with driving under the influence of alcohol and use of a prohibited weapon without probable cause in violation of his rights under the Fourth Amendment to the United States.

A two (2) day trial to a jury was held October 26 and 27, 2005. At the close of trial on October 27, 2005, the Court denied Defendant's oral motion for a directed verdict. On October 28, 2005, the jury entered a verdict in favor of Plaintiff. The jury awarded $350,000 in noneconomic losses, $150,000 in economic losses, and $500,000 in punitive damages.

III. ANALYSIS

A. Turner's Motion Pursuant to Fed.R.Civ.P. 50(b) for Judgment N.O.V. or, in the Alternative, for Relief from Judgment or a New Trial Pursuant to Fed.R.Civ.P. 59

Turner's motion first asserts that the Court should enter judgment in his favor under Rule 50(b), notwithstanding the verdict of the jury. In deciding a motion for judgment as a matter of law under Rule 50, "[a]ll reasonable inferences are drawn in favor of the nonmoving party and th[e] court does 'not make credibility determinations or weigh the evidence.'"

Loughridge v. Chiles Power Supply Co., Inc., 431 F.3d 1268, 1280 (10th Cir. 2005). "Judgment as a matter of law is appropriate 'only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position.'" *Id.* (quoting *Finley v. United States*, 82 F.3d 966, 968 (10th Cir. 1996)).

Turner argues as to the finding on liability under § 1983 that it is undisputed "that at least seven indicators of alcohol intoxication were present and observed by Corporal Turner." Def.'s Mot. at 1. Turner further asserts that even if he should have realized that other causes may have been present for the indicators, "his observation of them *in conjunction with the odor of alcohol and the admission of drinking* served to confirm a reasonable belief that Mr. Wilder was committing the offense of driving under the influence of alcohol or while his ability was impaired by alcohol." *Id.* at 5 (emphasis in original). Accordingly, he asserts that "the evidence leads to no other conclusion than that Corporal Turner had probable cause to arrest and charge Mr. Wilder." *Id.*

I reject Turner's argument. He appears to incorrectly assume that because there was evidence that seven indicators of alcohol intoxication were present, this automatically means that there was probable cause to arrest. As the jury was properly instructed, however, a finding of probable cause must be based on the totality of the circumstances. *See People v. Mendez*, 948 P.2d 105, 108 (Colo. App. 1997), *aff'd*, 986 P.2d 275 (Colo. 1999), *cert. denied*, 529 U.S. 1070

(2000). This determination is not tied to the presence of a certain number of indicators of alcohol intoxication, nor has Turner cited any case law that the indicators that were present give rise to probable cause as a matter of law. Here, while Turner testified to the presence of certain indicators that he believed showed alcohol intoxication, there was also evidence that Turner decided to improperly arrest Wilder because he refused to take voluntary roadside sobriety tests. There was also evidence from Wilder that many of the indicators Turner observed were due to other causes[1], and Wilder testified that no reasonable person in Turner's position could have believed that he was intoxicated.

Importantly, a tape recording was presented at trial of the encounter between Turner and Wilder which allowed the jury to assess the credibility of many of the alleged indicators of alcohol intoxication. For example, the taped encounter enabled the jury to assess the scope of Wilder's admissions to Turner, whether Wilder's speech was slow and deliberate, whether Wilder was argumentative, whether Wilder sounded intoxicated, and the general tone of the overall encounter between Turner and Wilder. The

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[1] As Turner acknowledged in his motion at page 5, Wilder testified that his flushed face was due to the cold, his red and watery eyes were due to the smoke of his cigarette and the wind in his face from a cracked window, and his fumbling appearance was due to the lack of light in the car, not lack of coordination. As to the lack of light, Wilder testified that he asked Turner for assistance through the use of his flashlight, and Turner refused.

jury may well have decided based upon such tape that they did not find Turner's account of the encounter to be credible. *See United Intern. Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1227 (10th Cir. 2000) ("[t]he jury has the 'exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact'") (quotation omitted), *aff'd*, 532 U.S. 588 (2001).

In short, I find that the evidence did not point only one way in favor of Turner. While there was some evidence that could have led the jury to find probable cause, this evidence was not sufficient to mean that Turner had probable cause to arrest and charge Wilder as a matter or [sic] law. Further, the evidence is susceptible to reasonable inferences which support Plaintiff's position that there was not probable cause to arrest him. Accordingly, I deny Turner's motion for judgment notwithstanding the verdict on this issue.

Turner also argues in his reply that judgment should be entered in his favor notwithstanding the verdict based on the defense of qualified immunity. Turner asserts that "his 'reasonable but mistaken conclusion that probable cause was present' could not be controverted" based on his observation of the seven indicators of alcohol intoxication. Def.'s Mot. at 3. I reject Turner's argument for the same reasons discussed above in connection with the finding of probable cause. There was evidence from which the jury

could infer that Turner arrested Wilder for a reason he knew was unlawful, *i.e.*, because Wilder refused to participate in voluntary roadside sobriety tests. If this evidence was accepted by the jury, the jury could have then reasonably inferred that Turner was not entitled to qualified immunity, *i.e.*, that Turner did not meet his burden of showing that a reasonable person in his position would not have known that his conduct violated Plaintiff's constitutional rights.[2]

Finally under Rule 50(b), Turner asserts that even if he lacked probable cause to arrest and charge Wilder, the Court should enter judgment in his favor as to the award of punitive damages. Turner argues that it was uncontroverted at trial that he acted in accordance with his training.[3] Further, Turner argues

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[2] I note that Defendant's initial motion to dismiss on the grounds of qualified immunity, filed before the Scheduling Conference in this case, was converted to a summary judgment motion and denied by Judge Kane. After discovery was completed, Defendant Turner did not file a motion for summary judgment within the deadline to do so. Very shortly before trial, Turner filed a motion for summary judgment on the basis of qualified immunity that was denied by me as untimely. *See* Order of October 14, 2005. The issue of qualified immunity was thus reserved to the jury, and the jury were instructed as to the standard they were required to find on this defense. *See Maestas v. Lujan*, 351 F.3d 1001, 1008-10 (10th Cir. 2003); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003); *Walker v. Elbert*, 75 F.3d 592, 598-99 (10th Cir. 1996). This standard is different than a ruling on qualified immunity in connection with a summary judgment motion.

[3] To the extent Plaintiff relief [sic] on inadequate training as a basis for punitive damages, Turner asserts that a negligent

(Continued on following page)

that "Plaintiff presented no evidence that Corporal Turner had acted maliciously or with any reckless disregard for the rights of Plaintiff, nor did Plaintiff present any evidence of ill-will." *Id.* at 3. The sum total of evidence supporting an award of punitive damages, according to Turner, was that he was "sarcastic", which does not satisfy the test for such damages.

Again, I reject Turner's argument. There was evidence at trial that could have supported a finding of punitive damages. For example, there was evidence, as referenced earlier, from which the jury could infer that Turner did not arrest Wilder for the reasons stated at trial but for an improper reason, *i.e.*, because Wilder refused to participate in a voluntary roadside sobriety test. There was further evidence wherein Turner attempted to persuade the jury that his pretrial affidavit indicating that arrested Wilder for refusing to take the sobriety test was false. The jury could have disbelieved Turner, and thought that he was lying under oath at trial about the true reasons for his arrest of Wilder. From this, the jury could have found that Turner's actions were recklessly or callously indifferent to Plaintiff's rights and/or that Turner's actions needed to be deterred

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training claim was not alleged and Turner cannot be held responsible for any inadequacy in his training. Turner further asserts that an award of punitive damages against Turner is not appropriate to send a message to the Colorado State Patrol to correct inadequacies of training.

and punished. *See Hardeman v. City of Albuquerque,* 377 F.3d 1106, 1120-21 (10th Cir. 2004). Accordingly, I deny the motion under Rule 50(b) to set aside the award of punitive damages.

Alternatively, Turner argues that the Court should alter or amend the judgment and reduce the amount of the award or grant a new trial under Rule 59. I first address noneconomic damages. Turner argues that Wilder presented no evidence that his reputation was harmed. I disagree. Wilder himself testified to the impact on his reputation in the small town that he lives in. The fact that Wilder did not bring in other witnesses to verify that his reputation was harmed does not diminish Wilder's own testimony on this point. Accordingly, I find that there was evidence to support the award of noneconomic damages, and I deny Defendant's motion on this issue.

As to economic damages, however, I agree with Turner that there is no evidence that supports an award of such damages. Wilder admitted at trial that he sustained no economic damages. While Wilder asserts that he testified "he was threatened with the possibility of losing his job as county attorney as a result of his arrest", there was no evidence that he actually lost this job. Further, as to Wilder's argument that it would have been reasonable for the jury to infer that the damage to Wilder would include a significant loss of income for the rest of his life, this is not supported. There was no evidence that Wilder expected to or did actually incur a loss of income, and no other evidence of economic losses. Accordingly,

Plaintiff's motion is granted on this issue. The Clerk of Court will be directed to amend the judgment to reflect that no economic damages are awarded.

As to punitive damages, Turner claims such damages are excessive and should be reduced. "'[I]t is well established that there are procedural and substantive constitutional limitations on [punitive damage] awards,' and that '[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.'" *Hardeman,* 377 F.3d at 1121 (quotation omitted). "In analyzing the constitutionality of punitive damages, the Supreme Court has instructed courts to look to 1) the degree of reprehensibility of the defendant's action; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and 3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases." *Id.* (citing *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574-75 (1996)).

In the case at hand, I find after a consideration of the factors stated in *BMW* that the punitive damages award is not excessive. The ratio of compensatory damages to punitive damages was originally 1:1. While the economic damages have now been eliminated, the ratio of compensatory to punitive damages is still lower than 2:1. According to the Tenth Circuit, "'in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'" *Id.*

(citing *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408 (2003)). Here, however, the ratio of punitive to compensatory damages is well within the single digits. Thus, I do not find the ratio of punitive damages to compensatory damages to be unreasonable. Further, the jury could further have found Turner's actions to be reprehensible for the reasons stated above in connection with the discussion of punitive damages. Finally, I find that Turner has not shown any other grounds that make the award of punitive damages excessive.

Finally, Turner argues that a new trial is proper because evidence was presented at trial about prior arrests made by Turner. Turner asserts that while an objection was made and sustained, the jury heard the question asked and was left with the intended negative effect. Turner further asserts that the prejudice to Turner "was immediate and could not be corrected by the objections." Def.'s Mot. at 9. I reject this argument as a motion to deny the motion for new trial. "If error was found in the admission of evidence, [the court] will set aside a jury verdict only if the error prejudicially affects a substantial right of a party." *Sanjuan v. IBP, Inc.,* 160 F.3d 1291, 1296 (10th Cir. 1998). I first note that Turner did not seek a curative instruction as to this issue. Second, Turner has not advanced any argument as to how his substantial rights were affected by the admission of this evidence. Finally, since Turner acknowledges that this objection was sustained and Turner was not required to answer

the question, I find that Turner's substantial rights were not impacted.

In conclusion, I find that Defendant's Motion Pursuant to Fed. R. Civ. P. 50(b) for Judgment N.O.V. or, in the Alternative, for Relief from Judgment or a New Trial Pursuant to Fed. R. Civ. P. 59 is granted in part and denied in part. The motion is granted as to the award of economic damages, and denied in all other respects.

B. Plaintiff's Motion for Court Order to Assess Costs of Court's Audio Expert

This motion seeks an order assessing costs of the audio expert in favor of Plaintiff in the amount of $1,426.00. Wilder asserts that the expert was made necessary by Turner's objection to Wilder's copy of the audio recording made by Turner, even though it was a jointly stipulated exhibit. Wilder further asserts that he should recover the costs of this expert pursuant to 42 U.S.C. § 1988(c) since he prevailed at trial.

In response, Turner denies that he was responsible for the costs of the expert, asserting that the transcript of the original trial shows that the statement that the audio recording may have been doctored in some way was made by Wilder's counsel. Turner asks the Court to assess the costs of the audio expert equally by the parties, and asserts that he has already paid the expert his half of the fee. Thus, Turner requests that the Court assess the remaining one-half of the fee due the audio expert to Wilder.

Wilder's reply disagrees with Turner's argument that it was Plaintiff's counsel who raised the issue of the doctored tape.

I find that Wilder's motion should be granted. While it is somewhat unclear who raised the issue of the doctored tapes, the parties stipulated to this expert being retained so that the issue of the audio tape's authenticity could be determined. 42 U.S.C. § 1988(c) allows the Court, in its discretion, to award expert fees as part of attorney's fees to the prevailing party. I exercise my discretion to assess the remaining fee due to the audio expert against Defendant Turner. In that regard, it appears based on Turner's response that he has already paid the expert $710.00. Accordingly, it appears that the remaining amount due the expert is $716.00 (from a total due of $1426.00), which cost is assessed against Turner.

C. Plaintiff's Verified Motions for Attorney Fees and Expenses

On December 14, 2005, Wilder filed two Verified Motions for Attorney Fees and Expenses seeking fees as the prevailing party pursuant to 42 U.S.C. § 1988 (docket #197 and 198). These appear to be the same motion filed twice, *i.e.*, they seek the same relief – an award of attorney fees in the amount of $62,666.92. On January 17, 2006, Turner filed a Statement indicating that he agrees that the attorney fees requested by Wilder are reasonable.

I find that an award of fees is proper under 42 U.S.C. § 1988. That statute authorizes a court to award a reasonable fee to a prevailing party, other than the United States, in any action or proceeding to enforce a provision of Section 1983. I find that an award of attorney fees is appropriate in this case. *See Robbins v. Chronister,* ___ F.3d ___, 2006 WL 172357, *6 (10th Cir. Jan. 25, 2006) ("[a]n award of attorney fees under 42 U.S.C. § 1988 is a departure from general practice, presumably designed as an incentive to plaintiffs to engage in litigation to vindicate civil rights"). I further find that the attorney fees sought by Plaintiff are reasonable, and that Plaintiff should be awarded fees in the total amount of $62,666.92 allocated as Plaintiff indicates in his motion.[4]

IV. CONCLUSION

Based upon the foregoing, it is

ORDERED that Defendant's Motion Pursuant to Fed.R.Civ.P. 50(b) for Judgment N.O.V. or, in the Alternative, for Relief from Judgment or a New Trial Pursuant to Fed.R.Civ.P. 59 is **GRANTED IN PART AND DENIED IN PART**. Specifically, it is

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[4] To the extent Turner indicates in his Statement that he will seek a stay of execution of the attorney fee judgment, the Court will not address this without the filing of a motion on the issue.

ORDERED that Defendant's motion is **GRANTED** in connection with the award of economic damages, and the Clerk of Court is directed to prepare an Amended Judgment indicating that no economic damages are awarded. Defendant's motion is **DENIED** in all other respects. It is

FURTHER ORDERED that Plaintiffs Motion for Court Order to Assess Costs of Court's Audio Expert (filed November 16, 2005) is **GRANTED.** The costs of the audio expert that are still outstanding in the amount of $716.00 are assessed against Turner. It is

FURTHER ORDERED that Plaintiffs Verified Motions for Attorney Fees and Expenses (filed December 14, 2005) are **GRANTED,** and Plaintiff is awarded $62,666.92 in attorney fees and expenses.

Dated: February 6, 2006

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 02-cv-00732-WYD-CBS

JOHN S. WILDER,

Plaintiff,

v.

KEVIN P. TURNER,

Defendant.

JUDGMENT

(Filed Sep. 17, 2007)

Pursuant to and in accordance with the Order filed on September 13, 2007 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of Defendant, Kevin P. Turner, and against Plaintiff, John S. Wilder, on the basis of qualified immunity. It is further

ORDERED that plaintiff's complaint and action are dismissed with prejudice. It is further

ORDERED that Defendant shall have its costs by the filing of a Bill of Costs with the Clerk of this Court within ten (10) days of entry of judgment.

DATED at Denver, Colorado this 17th day of September, 2007.

FOR THE COURT:

GREGORY C. LANGHAM, CLERK

s/Charlotte Hoard
Charlotte Hoard,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN S. WILDER, Plaintiff-Appellee, v. KEVIN P. TURNER, Defendant-Appellant.	No. 06-1092

ORDER

Filed August 24, 2007

Before **KELLY**, **BALDOCK**, and **GORSUCH**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: [Illegible]
Deputy Clerk